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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1943

No. 399

THE FAIRMONT CREAMERY COMPANY, PETITIONER AND RESPONDENT BELOW,

V.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT AND PETITIONER BELOW.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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NATIONAL LABOR RELATIONS BOARD, RESPONDENT AND PETITIONER BELOW.

PETITION FOR CERTIORARI.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

STATEMENT OF THE MATTER INVOLVED.

This case was commenced in the Circuit Court of Appeals for the Tenth Circuit on the original petition

of the National Labor Relations Board against The Fairmont Creamery Company, under the provisions of Section 10 (e) of the National Labor Relations Act (29 U. S. C. A., Sec. 160 [e]), to enforce by decree of court an order of the National Labor Relations Board for reinstatement, with back pay, of Ardis Dye and Victor McDaniel, two employees of The Fairmont Creamery Company, who had previously been discharged by the Company.

The testimony on behalf of The Fairmont Creamery Company evidenced a clear and valid ground of discharge, which was because of repeated and wilful absence from work without excuse. That the discharge was upon this ground, and immediately occasioned by an inexcusable absence in each instance, is proven by the uncontradicted and unimpeached testimony given on behalf of the Company.

The court found that the two employees were members of a labor union and had engaged in union activities, and though there is no evidence to connect their discharges with any such ground, the court drew the inference, in face of the uncontradicted and unimpeached proof that the employees were discharged on other and valid grounds, that the employees were discharged because of Union membership or activity.

That decision based upon an inference refuted by clearly proven facts is directly contrary to the law established by decisions in other Circuits.

JURISDICTIONAL STATEMENT.

It is contended that the Supreme Court has jurisdiction to review the decree here in question, under the pro-

visions of the National Labor Relations Act, Section 10 (e) (29 U. S. C. A., Sec. 160 [e]), providing for the review of such decisions by certiorari, and under Section 240 (a) of the Judicial Code (28 U. S. C. A., Sec. 347), providing for this method of review.

QUESTION PRESENTED.

The question presented herein is, can the Board or the court infer when the employee is a member of the Union or has engaged in Union activity, without further showing of any connection between such membership or activity with his discharge, that he was discharged on such a ground, when the uncontradicted and unimpeached testimony of the employer shows that he was discharged because of wilful and inexcusable absence from work.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The decision of the Circuit Court of Appeals, which gives effect to an inference that the discharge of the employees was because of Union membership or activity, an inference contrary to the uncontradicted and unimpeached testimony in behalf of the Company that the discharge was because of inexcusable absences, is a decision in conflict with decisions on the same matter of several Circuit Courts of Appeal, as follows: In the Circuit Court of Appeals for the Fifth Circuit in the cases of *N. L. R. B.* v. *Tex-O-Kan Flour Mills Co.*, 122 Fed. (2d) 433, and *N. L. R. B.* v. *Goodyear Tire & Rubber Co.*, 129 Fed. (2d) 661, and *N. L. R. B.* v. *Riverside Mfg. Co.*, 119 Fed. (2d) 302; in the Circuit Court of Appeals for the Third Circuit in the case of *N. L. R. B.*

v. *Sun Shipbuilding & Dry Dock Co.*, 135 Fed. (2d) 15; in the Circuit Court of Appeals for the Ninth Circuit in the case of *N. L. R. B.* v. *Citizen-News Co.*, 134 Fed. (2d) 970; in the Circuit Court of Appeals for the Sixth Circuit in the case of *N. L. R. B.* v. *Thompson Products*, 97 Fed. (2d) 13; and in the Circuit Court of Appeals for the Seventh Circuit in the cases of *N. L. R. B.* v. *Pick Mfg. Co.*, 135 Fed. (2d) 329, and *Interlake Iron Corporation* v. *N. L. R. B.*, 131 Fed. (2d) 129. (Supreme Court Rule 38 (5) [b]).

2. The decision of the Circuit Court of Appeals, which gave effect to an inference that employees were discharged because of Union membership or activity, when other valid grounds are clearly proven by uncontradicted and unimpeached testimony, involves an important question of federal law which has not been, but should be, settled by this court. (Supreme Court Rule 38 (5) [b]).

3. The decision of the Circuit Court of Appeals in giving effect to such an inference of fact, when a contrary state of facts has been directly proven by uncontradicted and unimpeached testimony, is a decision on a question of federal law probably in conflict with applicable decisions of this court, particularly the decision in *Pennsylvania Railroad Co.* v. *Chamberlain*, 288 U. S. 333, 77 L. Ed. 819. (Supreme Court Rule 38 (5) [b]).

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this court, directed to the Circuit Court of Appeals for the Tenth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the

proceedings of said Circuit Court of Appeals had in the case numbered and entitled on its docket, No. 2861, *National Labor Relations Board, Petitioner* v. *The Fairmont Creamery Company, Respondent,* to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that the decree herein of said Circuit Court of Appeals for the Tenth Circuit ordering reinstatement of said two employees be reversed by the court, and for such further relief as to this court may seem proper.

Dated this 21 day of August, 1944.

Respectfully submitted,

THE FAIRMONT CREAMERY COMPANY,

By Leonard A. Flansburg

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Attorneys for Petitioner.